(1) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JEFFREY WILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES SENTENCING BY A MENTALLY INCOMPETENT JUDGE SO SHOCK THE CONSCIENCE AS TO CONSTITUTE STRUCTURAL ERROR, AS THE NINTH CIRCUIT HAS RECENTLY HELD, AND IS SUCH FUNDAMENTAL ERROR COGNIZABLE ON COLLATERAL ATTACK, AS THE FOURTH CIRCUIT HAS SUGGESTED, OR IS A TRIAL JUDGE'S PROVEN MENTAL INCOMPETENCE DURING SENTENCING A LESSER FORM OF ERROR SUBJECT TO ALL RULES OF PROCEDURAL DEFAULT, AS THE EIGHTH CIRCUIT RULED BELOW?

II. DID THE EIGHTH CIRCUIT'S DISPOSITION ON DIRECT APPEAL OF PETITIONER'S CLAIM CONCERNING THE TRIAL JUDGE'S MENTAL COMPETENCE CONSTITUTE A DECISION ON THE MERITS BARRING A SECTION 2255 MOTION BASED ON THAT CLAIM WHERE 1) THE CLAIM NECESSARILY RELIED ON FACTS OUTSIDE THE APPELLATE RECORD, 2) NO HEARING WAS AFFORDED ON THE CLAIM, AND 3) PETITIONER'S SUBSEQUENT MOTION UNDER §2255 PRESENTED EXTRA-RECORD EVIDENCE WHICH, AS THE COURT OF APPEALS ACKNOWLEDGED, PROVED THAT THE CLAIM WAS TRUE?

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (App. 1-5) reversing the amended judgment of the district court was not reported. The Eighth Circuit's previous opinion in the case (App. 6-24) is reported in *United States v. Wiley*, 997 F.2d 378 (8th Cir. 1993), *cert. denied*, 510 U.S. 1011 (1993).

All of the district court's opinions were unreported. They include the district court magistrate's Report and Recommendation and Order (App. 25-40); the district court's Order Accepting the Magistrate's Report and Recommendation (App. 41-43); and the district court's Order Regarding Resentencing (App. 44-57).

STATEMENT OF JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on April 9, 2001. (App. 1-5) That Court denied rehearing in an order dated June 4, 2001. (App. 58) As reflected in this Court's notice issued on August 17, 2001, petitioner sought and received a sixty-day extension of time to file the instant petition, from September 2, 2001, to and including November 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

(Emphasis supplied)

STATEMENT OF THE CASE

In late 1991, petitioner Wiley and three others were indicted on various drug charges. (CR 1) In February, 1992, following a jury trial before the Honorable Donald Porter, Wiley was found guilty of conspiracy to distribute marijuana, distribution of marijuana, possession of marijuana with intent to distribute, and managing an establishment for the purpose of distributing a controlled substance. (CR 271) In June, 1992, Judge Porter, applying a final offense level of 34 under the Sentencing Guidelines, sentenced Wiley to 188 months imprisonment – i.e., at the top of the Guideline range – on the establishment and conspiracy counts, and a concurrent 60 months on

the remaining counts. The Court also imposed a substantial fine and forfeiture. (CR 339)

In June, 1993, the Eighth Circuit affirmed Wiley's convictions and sentence in a published opinion, *United States v. Wiley*, 997 F.2d 378 (8th Cir. 1993).

In April, 1997, Wiley filed a Motion to Vacate the Judgment under 28 U.S.C. §2255. (CR 472) The motion challenged the convictions and sentence on the basis of Judge Porter's alleged mental incompetence during the initial district court proceedings. Extensive new factual materials relating to the competence claim accompanied the motion. (*Id.*)

In January, 1999, district court Magistrate Zoss rejected Wiley's challenges to his convictions but concluded that the showing of Judge Porter's mental incompetence entitled Wiley to be resentenced by a trial judge more capable of evaluating the relevant evidence. (CR 499; App. 25-40). In August, 2000, district court Judge Mark Bennett accepted the magistrate's Report and Recommendation without change. (CR 504; App. 41-43) Following a new sentencing hearing (CR 514), Judge Bennett arrived at the same total offense level (34) calculated by Judge Porter. Judge Bennett's Order Regarding Resentencing, however, significantly reduced Judge Porter's initial drug quantity calculation. (CR 516; App. 44-57) Judge Bennett therefore imposed a term of imprisonment (151 months) at the bottom end of the available range

(App. 55-56), a disposition which was incorporated into the amended judgment (CR 517).[1]

The government timely appealed the District Court's Order Regarding Resentencing and related amended judgment. A three-judge panel of the Eighth Circuit Court of Appeals reversed the amended judgment on April 9, 2001. (App. 1-5) The Eighth Circuit denied Wiley's petition for rehearing and petition for rehearing en banc in an order dated June 4, 2001. (App. 58)

STATEMENT OF FACTS

A. Issues Presented And Decided On Direct Appeal

Wiley's two trial counsel represented Wiley in his direct appeal from his convictions. In that appeal, counsel filed a 60-page opening brief raising a host of claimed errors as to which the record below had been fully developed. In a concluding, 5-page argument filed under seal, counsel also alleged that "[Wiley] was denied his right to a fair trial because the judge who presided over his trial and sentenced him was mentally incompetent." In support of this claim, counsel submitted a 3-page affidavit from a Dr. Chuilli, a psychologist who had reviewed the trial court transcripts. Significantly, the affidavit had *not* been filed in the course of the district court proceedings, and hence was indisputably *outside* the record on appeal. (8th Cir. Supp. App. 78-80)

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[1] The resentencing thus resulted in a term of imprisonment of approximately 12 and 1/2 years, as opposed to the 15 and 1/2 year term imposed by Judge Porter.

The affidavit also set forth the psychologist's "preliminary impressions" which were purportedly consistent with a finding of mental incompetence. The affidavit indicated, however, that a formal neuropsychological evaluation would be needed before any formal conclusions could issue. (*Id.* at 79) In addition, the appellate argument summarized certain transcript excerpts suggesting deficiencies in Judge Porter's performance during the proceedings below. (8th Cir. App. 26-29) The briefing contained no specific claim describing how, or to what extent, Judge Porter's alleged incompetence affected his sentencing calculation or his exercise of discretion in the sentencing process. (*Id.* at 25-29)

Disposing of the judicial incompetence claim, the Court of Appeals stated:

> Finally, defendants have submitted a portion of their briefs under seal, together with excerpts from the transcripts and related materials. We have considered the arguments made under seal with care. They are serious arguments. After considering all of the relevant factors, we hold that no error occurred affecting defendants' substantial rights.

United States v. Wiley, 997 F.2d at 386. (App. 24)

B. Evidence Of Mental Incompetence Contained In Defendant's Motion

In his April, 1997, motion under 28 U.S.C. §2255, Wiley argued, *inter alia*, that significant new evidence demonstrated Judge Porter's mental incompetence at trial and sentencing, thereby establishing a deprivation of

Wiley's right to a fair trial. Wiley also alleged ineffective assistance of counsel based on his lawyers' purported acts and omission in connection with the incompetence claim both at trial and on appeal.[2] In support of these allegations, Wiley presented a wealth of evidence never proffered on his direct appeal, summarized as follows:

First, three of the jurors at the initial trial stated their concerns about Judge Porter's competency based on their observations at trial. The jurors variously recalled that the Judge forgot what he was saying, repeated himself, and needed help from the clerk in finding his place during the proceedings. Two other courtroom observers recalled that Judge Porter appeared disoriented, unable to comprehend objections, non-responsive to questions from counsel, and unable to remember what was occurring at trial. *All* of these jurors and observers stated that they would be concerned about appearing as a defendant before Judge Porter. (See 8th Cir. Supp. App. 45-54)

Second, petitioner and his two trial counsel submitted detailed declarations concerning Judge Porter's disorientation and his memory, comprehension, and cognitive problems at trial, noting also that he was aided by his court room clerk on most occasions. Petitioner also recalled that he frequently asked his counsel about replacing the judge, a fact which counsel confirmed. (*Id.*, at 56-67)

Third, Diana Weiss, one of the attorneys who prepared the section 2255 motion, described her investigation

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[2] In addition, Wiley argued that he was entitled to resentencing in light of new evidence relating to drug quantity. (CR 472)

concerning Judge Porter's competency at the time of the trial. Ms. Weiss' declaration demonstrated that of the cases initially assigned to Judge Porter at various times in 1993, most, if not all, were transferred to other judges within the district. Ms. Weiss also spoke with a number of attorneys who had personally observed and/or appeared before Judge Porter during the relevant time period. Many reported that by 1990 or 1991, i.e., near the end of his time on the bench, Judge Porter showed signs of being unable to execute his judicial functions.

One attorney told Weiss about a time when the judge ran back into court after imposing a sentence and yelled "I made a mistake. I wanted to give him the max." Another stated that "it was common knowledge that Judge Porter was not competent" his last few years on the bench. Another stated that in later years the judge was forgetful, not up to the job, and unable to proceed through a sentencing without forgetting the names of those before him. The judge did not know what floor the court room was on. Yet another described an instance in which Judge Porter attempted to sentence a member of the attorney's family and could not differentiate between the attorney and the client.

Another attorney who had many cases before Judge Porter stated that he had begun to see a change in the judge in the early 1990's and that "he should have been off the bench by 1990 and 1991." He also stated that "everyone had heard about the case in Iowa [i.e., the original proceedings in this case] even before the case was over, [and] we heard what a disaster and travesty the Iowa case had been because the judge was incoherent, disoriented, and therefore not able to perform his judicial

functions." A former employee confirmed that employees had serious concerns about the judge's health problems, and that the decline in the judge's health and mental abilities had begun in the mid to late 1980's. Several other persons stated that Judge Porter has a full-time attendant and is now receiving full-time medical care at the Mayo Clinic in Rochester, Minnesota. (8th Cir. Supp. App. 28-37)

Finally, a psychiatrist (Robert Gerner, M.D.) reviewed court transcripts of proceedings before Judge Porter in 1990 and 1992 and saw indications of organic brain disorder. Dr. Gerner opined that the transcripts – including those relating to the original proceedings in this case – disclosed a deterioration of cognitive thinking abilities during this time period. He described the basis for his opinions in detail, and concluded that in 1992, Judge Porter's symptoms rendered him unable to perform cognitive functions necessary for comprehension and analysis of legal issues. Dr. Gerner was unable to say what kind of brain damage was present without access to medical records,[3] but he opined that the Judge's behavior during trial was consistent with Alzheimer's. (Supp. App. 38-40) A clinical psychologist (Joan Cartwright, Ph.D.) reached similar conclusions based on an equally thorough review of relevant transcripts. (*Id.*, at 41-44)

Significantly, in its responses (CR 477, 484, 488, 494) to Wiley's motion, the government relied almost entirely on the argument that Wiley's claims were procedurally

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[3] In conjunction with his motion, Wiley sought issuance of subpoenas duces tecum directed at disclosure of Judge Porter's medical records. (CR 480)

barred, and never contested the truth or reliability of the statements contained in Wiley's exhibits concerning Judge Porter's mental incompetence at the time of trial.

C. District Court And Appellate Rulings On Petitioner's Claims

In January, 1999, the Magistrate issued its Report and Recommendation and Order ("Report") which accepted the government's argument that the incompetence claim had been decided on appeal and was therefore procedurally barred from reconsideration in connection with the pending motion. The Magistrate further concluded that the claims based on new evidence of incompetence and the ineffectiveness of trial and appellate counsel could not surmount the procedural bar because they did not implicate the validity of Wiley's substantive convictions. (App. 28-36) While it affirmed the convictions on these bases, the Report nevertheless found that Wiley had presented a sufficient record to establish Judge Porter's mental incompetence, and that Wiley would likely have received a different sentence if the judge had been "better able to evaluate the evidence presented at [that proceeding]." (App. 37) The Report concluded that fundamental requirements of due process and the "miscarriage of justice" exception to the rules of procedural bar required resentencing by a mentally competent judge. (*Id.*)[4]

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[4] The magistrate declined to permit the issuance of subpoenas on the grounds, *inter alia*, that Wiley had established his claim as to the need for resentencing "without the need for additional evidence." (App. 38-39)

On August 15, 2000, District Court Judge Bennett issued his order accepting the Report in full. (CR 504; App. 41-43). On September 11, 2000, following hearing, the Court issued its Order Regarding Resentencing. (CR 516; App. 44-57) As described in the petitioner's Eighth Circuit brief (at 19-21), Judge Bennett performed a careful and detailed examination of the evidence relating to drug quantity. While these calculations placed Wiley at the same base offense level (34) employed by Judge Porter, Judge Bennett determined that the quantities were substantially below Judge Porter's result, and close to the "floor" for the relevant guideline category. Judge Bennett accordingly resentenced Wiley at the low end of the guideline range, i.e., to 151 months imprisonment. (CR 516, 517; App. 53-56) The district court's amended judgment incorporated the terms of this Order. (CR 517)

Finally, in its opinion reversing the amended judgment of the district court, the Eighth Circuit Court of Appeals both 1) acknowledged the fact that Wiley's section 2255 application had presented "new evidence in (the form of affidavits from jurors, persons who attended Mr. Wiley's trial, and Mr. Wiley himself) tending to show that the sentencing judge was incompetent . . . " (App. 4), and 2) accepted the district court's related finding that the trial judge had indeed been mentally impaired at the time of sentencing (App. 2). Nevertheless, the Court ruled that resentencing was not warranted because the competence claim purportedly had been decided against Wiley on appeal. In this connection, the Court concluded that the "miscarriage of justice" exception could not operate to surmount this procedural bar because the new evidence of incompetence did not establish Wiley's actual

innocence of the underlying offenses. (App. 3-5). The Eighth Circuit therefore reversed the judgment of the district court. (*Ibid.*)

REASONS FOR GRANTING THE PETITION

This case involves a successful appeal by the government from an order under 28 U.S.C. §2255 granting defendant Jeffrey Wiley a new sentencing hearing and reducing his initial sentence by 37 months. The grant of the new sentencing hearing rested on a finding unique in the history of the federal judiciary: that a district court judge presided over a criminal proceeding while mentally incompetent, thereby depriving the defendant of due process of law.

In its opinion, the Eighth Circuit panel candidly recognized that in partially granting Wiley's motion and reducing his sentence, both the magistrate and the district court had found, based on evidence proffered in support of the section 2255 motion, that the sentencing judge, the Honorable Donald J. Porter, "was not mentally competent to determine Mr. Wiley's sentence . . . " (App. 2) The panel did not dispute that a criminal defendant is entitled under the due process clause to a sentencing judge who is in possession of his mental faculties. See, e.g., *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912) ("Due process implies a tribunal both impartial and mentally competent to afford a hearing."); *Smith v. Cox*, 435 F.2d 453, 460 (4th Cir. 1970), *vacated on other grounds*, 404 U.S. 53 (1971) (Due process clause guarantees that the determination of sentence be made by a judicial officer mentally competent to

carry out his duties.) Thus the panel assumed that Wiley was deprived of his constitutional right to be sentenced by a mentally competent judge.

Yet the panel stripped Wiley of the relief that the lower court had granted: a new sentencing hearing before a mentally competent judge who then found the defendant's original sentence was excessive and reduced it from 188 to 151 months. The panel reversed on the ground that:

> Mr. Wiley raised the issue of the sentencing judge's competence in his direct appeal and the issue was decided against him. See *Wiley*, 997 F.2d at 386. Issues raised and decided in direct appeal cannot ordinarily be relitigated in a collateral proceeding based on 28 U.S.C. §2255.

Id., at 2, citing *United States v. Wiley*, 997 F.2d 278 (8th Cir. 1993).

It is true that in a five page argument filed under seal on direct appeal, Wiley had asked the Eighth Circuit to consider whether the record justified a finding of mental incompetence on the part of the trial judge, and to remand for an evidentiary hearing on that question. Without discussing the facts or law, the Eighth Circuit in denying the direct appeal had held: "that no error occurred affecting defendants' substantial rights." *Wiley*, 997 F.2d at 386.

Despite the proffer by Wiley's appellate attorney of a declaration from a psychiatrist, however, the claim of mental incompetence on direct appeal was necessarily

decided on the trial record alone. As this Court held in *Sanders v. United States*, 373 U.S. 1 (1963), such a decision was not a plenary disposition on the merits and did not preclude review in a subsequent section 2255 application, because the underlying claim of the trial judge's mental incompetence necessarily depended on facts outside the record, and because the Court of Appeals did not have before it the evidence presented in the section 2255 proceeding, much of which did not exist at the time of the direct appeal. Furthermore, as petitioner demonstrates below, the Court of Appeals was not *authorized* even to consider the limited factual material which appellate counsel submitted in support of the claim. For these reasons, the appellate disposition necessarily was without prejudice to petitioner's renewal of the claim in connection with the section 2255 application. The Court of Appeals' reliance on the doctrine of procedural default, therefore, flatly contravened the principles which, under this Court's precedent, govern a federal prisoner's right to seek collateral relief.

Of equal or greater importance, the Eighth Circuit's decision is necessarily in conflict with the view of this Court and other circuits as to the fundamental importance of a competent and impartial judge to the functioning of our justice system. As this Court has repeatedly recognized (See *Edwards v. Balisok*, 520 U.S. 641, 647 (1997), *Tumey v. Ohio*, 273 U.S. 510 (1927), and *Jordan*, supra), a biased judge represents nothing less than a structural error which infects the entire trial mechanism and warrants reversal whether or not the result would have been altered had the procedure been fair. That same

principle must apply to a judge who is mentally incompetent to perform his duties. Indeed, as the Ninth Circuit Court of Appeals observed in an opinion issued earlier this month, sentencing by a tribunal whose judgment has been impaired is so egregious as to shock the conscience and constitutes structural error. See *Summerlin v. Stewart*, ___ F.3d ___ 2000 WL 33544348 (9th Cir. 2001). The Fourth Circuit has observed that the "post-sentence discovery of a judge's mental incompetency," precisely what occurred here, is one of the "exceptional circumstances . . . embraced in 2255's words 'collateral attack'." *United States v. Lewis*, 392 F.2d 440, 443 (4th Cir. 1968). This conflict in the Circuits merits this Court's attention.

Finally, even were this Court to construe the "miscarriage of justice" exception as requiring a showing that a different result would have issued in the absence of the error, petitioner has satisfied that condition here. As described above, with the benefit of a competent judge, and hence a fair procedure, Wiley received a sentence which was actually different and more favorable than the one originally imposed by Judge Porter. Imposition of the original sentence under such circumstances therefore represents a flagrant miscarriage of justice which is sufficient to overcome any procedural bar arising from the Eighth Circuit's initial decision on direct appeal.

ARGUMENT

I. THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE WILEY'S SENTENCING BY A MENTALLY INCOMPETENT JUDICIAL OFFICER CONSTITUTED A FUNDAMENTAL MISCARRIAGE OF JUSTICE EXCUSING ANY PERCEIVED PROCEDURAL DEFAULT

Supreme Court Rule 10 lists as reasons supporting a grant of certiorari the presence of a federal appellate decision on a question of federal law which has not been, but should be, settled by this Court, or the presence of a decision which conflicts with one issued by another United States Court of Appeals on the same question. (See Supreme Court Rules 10(a) and 10(c).) Both of these factors are present in this matter.

As set forth more fully below, the district court in this case determined that Wiley's competence claim was sufficient to surmount any procedural bar to resentencing because a denial of resentencing would constitute a "miscarriage of justice." The Court of Appeals disagreed, concluding that Supreme Court and Eighth Circuit precedent permits application of the exception to successive petitions for collateral relief only where a petitioner can demonstrate "actual innocence" of a capital sentence or of his underlying convictions. (App. 1-5)

As discussed in the argument that follows, Wiley strenuously disputes the conclusion that the Eighth Circuit's appellate decision was "on the merits," and that a procedural bar or default should ever have been invoked in the first instance. Even were such a default properly recognized, however, Wiley submits that the sentencing

of a criminal defendant by a mentally incompetent trial judge meets all rational criteria for applying the miscarriage of justice exception to the procedural default rule. This issue of first impression is of sufficient importance to merit review on certiorari.

In *Murray v. Carrier*, 477 U.S. 478 (1986), the Court held that, in order to invoke this exception and thereby overcome a procedural default, a federal habeas corpus petitioner is required to show that a constitutional violation probably resulted in the conviction of one who is actually innocent of the charged crimes. In *Sawyer v. Whitley*, 505 U.S. 333 (1992), however, the Court recognized that the exception could also be invoked by a capital sentencing defendant where he could demonstrate by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. *Id.*, 503 U.S. at 336. In such instances, the Court concluded, the defendant would have demonstrated his "actual innocence" of the death penalty, thereby permitting him access to the exception recognized in *Murray*. As the Court subsequently explained in *Schlup v. Delo*, 513 U.S. 298 (1995), the adherence to the "actual innocence" standard in the sentencing context reflects the Court's determination that use of the exception be rare and applied only in the extraordinary case. *Ibid.*, at 321.

If ever there were a rare and extraordinary case calling for an application of the "miscarriage of justice" exception, it is this one. Indeed, the fundamental and offensive nature of the constitutional violation supporting such an application was the subject of an extensive Ninth Circuit opinion issued within the last several

weeks. Thus, in *Summerlin v. Stewart*, ___ F.3d ___, 2000 WL 33544348 (9th Cir. 2001), the Court of Appeals ruled that a capital defendant and habeas petitioner was entitled to an evidentiary hearing on his claim that the trial judge's alleged addiction to marijuana deprived him of his right to due process of law. In support of its ruling, the Court observed:

> One's legal conscience simply recoils at the shocking thought that the due process clause of the Fourteenth Amendment is satisfied by a judge presiding over a criminal trial and making life or death sentencing decisions while under the influence of, or materially impaired by, the use of an illegal mind-altering substance. Such proceedings before a mentally incompetent judge would be so fundamentally unfair as to violate federal due process under the Constitution. *See Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

Summerlin, at *22. Furthermore, as the Court in *Summerlin* later observed,

> It is difficult to gainsay the importance of enforcing with efficient and sensible sanctions the core due process guarantees in our Constitution. To look the other way in the face of certain serious constitutional deficiencies is to render those guarantees " 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties." *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Frequently, we do use the doctrine of harmless error with respect to a wide spectrum of constitutional failures, but not such a fault

> involving the performance of a judge who was demonstrably not impartial. *See Arizona v. Fulminante*, 499 U.S. 279, 306-311, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The Supreme Court has labeled this kind of systemic defect "structural error" and rendered it categorically immune from harmless error analysis. *Id.* at 309-10; *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). The reason for regarding this level of constitutional failure as "structural" is obvious: impartiality is the *sine qua non* of judging. Bias or favoritism is utterly irreconcilable with and necessarily perverts the judicial function. The rule of law which provides the framework for our system of justice is thwarted by a judge marching to an unauthorized drummer.

Summerlin, at *28.

Precisely the same concerns raised by the Court in *Summerlin* are implicated by the Eighth Circuit's judgment in the present case. Thus, as this Court stated in *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912), "Due process implies a tribunal both impartial and *mentally competent* to afford a hearing." (Emphasis added) As Wiley argued below, the "miscarriage of justice" exception is always warranted in the extraordinary circumstance of a trial judge who was unable to exercise his discretion, when the length of a prison term turned entirely on an exercise of that discretion. As *Summerlin* confirms, so egregious is this error that it constitutes a "structural defect[ ] in the constitution of the trial mechanism, which [defies] analysis by 'harmless error' standards" and "infect[s] the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993). *Cf. Theriot v. Whitley*, 18 F.3d 311, 313 (5th Cir. 1994) (observing in an

analogous context that whether a defendant was guilty or innocent is irrelevant if he was convicted while incompetent).

In *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court held that a trial conducted by a judge burdened by a conflict of interest was so manifestly unfair and violative of due process that reversal of a resulting criminal conviction was required without any showing by the defendant of any specific prejudice to him caused by the constitutional error. "No matter what the evidence was against him, he had the right to have an impartial judge." *Id.*, at 535; see also *Edwards v. Balisok*, 520 U.S. 641, 647 (1997) ("A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him."). Likewise, every defendant whose liberty rests on a proper exercise of judicial discretion has a right to a judge capable of exercising that discretion.

In *United States v. Lewis*, 392 F.2d 440 (4th Cir. 1968), the Court of Appeals considered a defendant's motion under section 2255 which complained of a sentence that, while lawful on its face, was imposed under the trial judge's misunderstanding that the maximum term was required. The Court found the error cognizable on collateral attack for compelling reasons which are equally applicable here:

> [W]e do not have "mere error" here. Lewis' plight is unusual and extraordinary. To begin with, the flaw is found at a juncture of the trial beyond and wholly apart from the finding of guilt. The sentencing area is far narrower than the pre-verdict range. A retrial is not needed to rectify the fault. Hence, there is less reason to

> refuse, for a sentencing error, the 2255 remedy lest it furnish precedent for redress of trial errors generally.
>
> Parallel situations illustrate the need for 2255 relief here. Without the District Judge's candor in disclosing his reasoning of the sentence, and with no appeal or an unsuccessful appeal, certainly upon discovery of the basis, justice would have compelled allowance of resort to 2255. *Another conceivable example would be a post-sentence discovery of a judge's mental incompetency.* Rare as well as unprecedented conditions – well termed 'exceptional circumstances' – we think, are embraced in 2255's words 'collateral attack'.
>
> The facts here come within that definition of the phrase. The judge's misconception drove him to act contrary to his considered judgment. He felt bereft of all discretion. Of course, the legislature may deprive a court of a freedom of action previously possessed but courts cannot so bind themselves. [citation omitted] *A defendant is entitled to the unfettered and unset deliberation of the judge . . .*

Id., 392 F.2d at 443; *see also Smith v. Cox*, 435 F.2d 453, 460 (4th Cir. 1970), *vacated on other grounds*, 404 U.S. 53 (1971) (quoted by the Magistrate [App. 37] and stating, "We have no doubt that the due process clause of the fourteenth amendment guarantees that the determination of sentence be made by a judicial officer mentally competent to carry out his duties. To permit a mentally impaired man to weigh the myriad considerations and to make the difficult choices involved in fixing a punishment – choices which often depend on insights into defendant's character and future behavior as well as conclusions as to

the seriousness of the offense – would surely violate the standards of fair play established by the due process clause.").

Finally, Wiley observes that his claim not only implicates the doctrine of "structural error," but also satisfies any concern with demonstrating *actual* prejudice (or, in this context, his "actual innocence" of the sentence actually imposed upon him). That is because Wiley's sentencing before a mentally competent judge resulted in a sentence that was *different and lesser* than the one initially imposed by Judge Porter. Thus, Wiley has demonstrated by clear and convincing evidence the existence of prejudice in the sense discussed by the Court in *Sawyer*.

The above considerations compel the conclusion that Wiley's sentencing by an incompetent trial judge was a manifest miscarriage of justice which deprived Wiley of the most rudimentary requirements of a fair sentencing and which excuse any procedural default which arguably could be attributed to him. For that reason, the district court's invocation of the miscarriage of justice exception was proper, and the petition should be granted.

II. THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE THE EIGHTH CIRCUIT'S APPELLATE DISPOSITION OF THE INCOMPETENCE CLAIM WAS NOT ON THE MERITS AND THEREFORE DID NOT RAISE A PROCEDURAL BAR TO ITS CONSIDERATION BY THE DISTRICT COURT

A. Introduction

Among the special and important reasons why a petition for a writ of certiorari will be granted, Rule 10(c) of the Supreme Court Rules lists a challenge to a United States Court of Appeal opinion which "has decided a federal question in a way that conflicts with the applicable decisions of [the Supreme] Court."

As set forth above, the Court of Appeals rejected petitioner's claim concerning the mental competence of the sentencing judge on the grounds, among others, that it had been decided against petitioner on direct appeal, thereby raising a procedural bar to its reconsideration by means of an application under section 2255. Under Rule 10, the Eighth Circuit's disposition of this federal question merits review on certiorari because it is flatly irreconcilable with this Court's precedent concerning the rules of procedural bar vis-a-vis applications for collateral relief from federal criminal convictions.

B. Supreme Court Standards Relating To Procedural Bar

In *Sanders v. United States*, 373 U.S. 1 (1963), this Court observed that principles of res judicata may not be applied to limit collateral relief from criminal judgments,

whether applications for such relief are pursued by state prisoners via habeas corpus or by federal petitions via motions under 28 U.S.C. §2255. As the Court explained, "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Id.*, 373 U.S. at 8. This principle led the Court to announce a distinct and equitable approach for federal courts assessing the viability of claims for collateral relief which those courts had previously rejected. Specifically, *Sanders* held that except where the record shows the application to be conclusively without merit, controlling weight may be given to denial of a prior application for federal habeas corpus or section 2255 relief on a ground previously determined – i.e., a procedural bar may be raised – only if all of the following three conditions are met: (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. *Sanders*, 373 U.S. at 15. As to what a determination "on the merits" entails, the Court explained:

> This means that *if factual issues were raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held.*

Id. (Emphasis added); *cf. Fontaine v. United States*, 411 U.S. 213 (1973) (vacating judgment of Court of Appeals and remanding for evidentiary hearing as to allegation of coerced guilty plea where record did not conclusively show claim was without merit).

A merits determination, moreover, requires more than the mere formality of a hearing; thus, where factual issues are involved, a prior hearing may preclude consideration of a renewed claim only where that hearing was "full and fair." *Sanders*, 373 U.S. at 17; *Salinger v. Loisel*, 265 U.S. 224, 231-2 (1924) (treatment of second petition turns on "fullness of the consideration" that court gave to first petition).

In *Sanders*, this Court applied these principles to reverse an erroneous district court and appellate determination that a claim brought under section 2255 was barred because it had been presented in a prior 2255 application before the district court. *Sanders*, 373 U.S. at 2-6, 23. The prior application, which alleged that his plea to a robbery charge had been coerced, had been denied without a hearing and never appealed. The second application alleged that he had been mentally incompetent at the time of the plea and was accompanied by a detailed factual affidavit. This application was likewise ordered dismissed, a result which was affirmed on appeal.

Reviewing the district court's observation that the files and records of the case conclusively foreclosed relief, the Supreme Court in *Sanders* noted that such files and records could not "conclusively show" that the incompetence claim alleged in the second section 2255 was baseless because no matter how regular the plea proceedings appeared, it still might be the case that Sanders had not made an intelligent and understanding waiver of his rights:

> For the facts on which petitioner's claim in his second application is predicated are *outside the record*.

Id., at 19-20 (Emphasis added). For these reasons, the Court reversed and remanded the case for an evidentiary hearing on the incompetence claim. *Id.*, at 20-23.

The present case, of course, does not concern a renewal of a claim included in a prior motion under 28 U.S.C. §2255, but rather one that was raised in the course of a previous federal appeal. In *Kaufman v. United States*, 394 U.S. 217 (1969), *disapproved on other grounds, Stone v. Powell*, 428 U.S. 465, 479-480 (1976), however, this Court made clear that the principles identified in *Sanders* were equally applicable in either setting. *Ibid.*, at 227, n.8, 230-231. In this connection, the Court quoted, and expressly adopted, the reasoning expressed in Judge Wright's dissent in *Thornton v. United States*, 358 F.2d 822, 833 (D.C. Cir. 1966):

> Where a federal trial or appellate court has had a 'say' on a federal prisoner's claim, there may be no need for collateral relitigation. But . . . [w]hat if it is unclear whether the 'say' was on the merits? What if new law has been made or facts uncovered relating to the constitutional claim since the trial and appeal? What if the trial or appellate court based its rulings on findings of fact made after a hearing not 'full and fair' within the meaning of *Townsend v. Sain*, 372 U.S. 293 . . . (1963)?

Under all such circumstances, the Court indicated, a previously "adjudicated" appellate claim should, and would, remain viable in a proceeding under section 2255. *Kaufman*, 394 U.S. at 230-231.

C. The Eighth Circuit's Ruling Contravenes This Court's Precedent Concerning Procedural Bars

The *Sanders* analysis thus establishes a host of reasons establishing that the Eighth Circuit's initial appellate ruling was not on the merits and that no procedural bar could apply to Wiley's incompetence claim below. *First*, in this case, it is no less true than in *Sanders* that the facts on which Wiley based his appellate claim of judicial incompetence were necessarily *outside of the appellate record*, as Wiley's factual submissions below amply demonstrate. Indeed, the government's appellate brief expressly faulted Wiley for the dearth of evidentiary support for the claim as initially presented on appeal. Under *Sanders*, therefore, the records and files before the appellate court were *necessarily* inadequate for purposes of "conclusively" disposing of the incompetence claim on appeal. *Id.*, 373 U.S. at 19-20.

Second, the single affidavit supplied by Dr. Chuilli on direct appeal can hardly be construed as supplying an adequate record to dispose of the claim. Putting aside its brevity and the tentative nature of the opinion proffered, the affidavit was not cognizable on appeal as a matter of law. That is because an appellate court can properly consider only the record and facts before the district court and thus only those papers and exhibits filed in the district court can constitute the record on appeal. This, moreover, is a principle to which not only this Court, but every Circuit Court of Appeals, including the Eighth Circuit, adheres. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941); Fed.R.App.P. 10(a) (original papers and exhibits

filed in district court, transcript of proceedings, and certified copy of docket constitute the record on appeal in all cases); *Huelsman v. Civic Center Corp.*, 873 F.2d 1171, 1175 (8th Cir. 1989) ("Because this affidavit is presented for the first time at the appellate stage, it is not part of the record for our review. Therefore, we cannot consider it as evidence of the nexus with interstate commerce"); *see also United States v. Kobrosky*, 711 F.2d 449, 457 (1st Cir. 1983); *United States v. Burns*, 104 F.3d 529, 539 (2nd Cir. 1997); *In re Capital Cities/ABC's Application for Access to Sealed Transcripts*, 913 F.2d 89, 96 (3rd Cir. 1990); *Colonial Penn Insurance Company v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Mitchell v. Trade Winds Co.*, 289 F.2d 278, 279 (5th Cir. 1961); *Mustata v. U.S. Dept. of Justice*, 179 F.3d 1017, 1019, n.1 (6th Cir. 1999); *United States v. Phillips*, 914 F.2d 835, 840 (7th Cir. 1990); *Daly-Murphy v. Winston*, 837 F.2d 348, 351 (9th Cir. 1987); *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000); *United States v. Bosby*, 675 F.2d 1174, 1181 n.9 (11th Cir. 1982).

Third, and perhaps most obviously, *no* evidentiary hearing, much less a "full and fair" hearing, was ever conducted to develop the facts relating to Wiley's incompetence claim prior to or at the time of its presentation on appeal. As a matter of law, these features of the prior ruling foreclose any finding of a prior disposition on the merits. *Sanders*, 373 U.S. at 16-17.

Finally, the appellate court was not the proper forum to first consider Wiley's incompetence claim and, absent the exceptional circumstance discussed below, no substantive consideration could duly have been afforded it. Insofar as such a claim is necessarily founded on facts which do not appear in the record – and which, indeed,

may be actively (if understandably) concealed at trial – it is conceptually no different than a claim alleging ineffective assistance of counsel. Like other Courts of Appeal, the Eighth Circuit has repeatedly held that such claims usually require examination of facts outside the record and are therefore more appropriately raised in a collateral proceeding under 28 U.S.C. §2255. *See*, e.g., *United States v. Covey*, 232 F.3d 641 (8th Cir. 2000); *United States v. Jennings*, 12 F.3d 836, 840 (8th Cir. 1994) (ineffectiveness claims generally not cognizable on direct appeal; such claims properly are raised in a proceeding under section 2255 or on habeas corpus; and "[t]he rare exception to this rule occurs when the district court has developed a record on the ineffectiveness issue"); *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995); *United States v. Williams*, 994 F.2d 1287, 1290-1 (8th Cir. 1993); *Kelley v. Crunk*, 713 F.2d 426, 427 (8th Cir. 1983) (per curiam). These decisions thus establish that while Wiley's incompetence claim was not cognizable on direct appeal, it subsequently *was* properly presented pursuant to section 2255.

The appellate disposition of Wiley's claim that his trial judge was mentally incompetent simply meant that the record then before the Eighth Circuit did not disclose any error so fundamental that relief should be granted without further development of the facts. At the same time, the disposition must be understood as having issued *without prejudice* to renewal of the claim under section 2255 so that such factual development could proceed in the appropriate forum.

Thus, under *Sanders* and its progeny, as well as under relevant Eighth Circuit authority, the Court of Appeals'

disposition of Wiley's challenge to the trial judge's competence was not "on the merits." That disposition therefore raised no procedural bar to renewal of the claim in the court below by a motion under section 2255. The government's attack on the sentencing reduction granted Wiley on his section 2255 motion was confined to the issue of that alleged bar. For these reasons, the Court should grant the petition.

CONCLUSION

For the reasons stated, the Court should grant the instant petition and either order briefing and argument on the case in this Court or, alternatively, summarily reverse the judgment of the Court of Appeals so that the district court's amended judgment may be reinstated.

Dated: November 1, 2001

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-3444

United States of America, Appellant, v. Jeffrey Wiley, Appellee.	* * * * * * *	Appeal from the United States District Court for the Northern District of Iowa.

Submitted: March 12, 2001

Filed: April 9, 2001

Before RICHARD S. ARNOLD and MORRIS SHEPPARD ARNOLD, Circuit Judges, and MONTGOMERY,[1] District Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

The United States appeals from the district court's judgment in a proceeding under 28 U.S.C. § 2255 reducing Jeffrey Wiley's sentence from 188 months to 151 months. We reverse.

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[1] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota, sitting by designation.

Mr. Wiley was convicted eight years ago of four violations of the federal drug laws involving the distribution of marijuana, and his convictions and sentence were upheld on appeal. *See United States v. Wiley*, 997 F.2d 378 (8th Cir. 1993), *cert. denied*, 510 U.S. 1011 (1993). In the instant post-conviction proceeding, he raised a number of matters in the district court, only one of which, the mental competence of the judge who sentenced him, is before us. The district court reviewed and reduced Mr. Wiley's sentence, relying entirely on the record of the original sentencing hearing, after it adopted a magistrate judge's ruling that the sentencing judge "might not have exercised appropriate judgment" and "that there is a reasonable probability that Wiley would have received a different sentence if the [sentencing] judge had been better able to evaluate the evidence presented at sentencing."

As the government points out, the magistrate judge's somewhat tentative finding that the original sentencing judge "might not have exercised appropriate judgment" could not furnish a proper basis for reviewing Mr. Wiley's sentence, and the government argues that the district court's action in doing so was reversible error on this ground alone. We pass over this point, however, because we think it probable that the magistrate judge intended to find that the sentencing judge was not mentally competent to determine Mr. Wiley's sentence, and resorted to a somewhat oblique circumlocution because of the delicacy of the matter. We assume, too, that the district court construed the magistrate judge's language as a holding that the sentencing judge was incompetent.

Even so, we believe that the district judge erred in resentencing Mr. Wiley, because Mr. Wiley raised the issue of the sentencing judge's competence in his direct appeal and the issue was decided against him. *See Wiley*, 997 F.2d at 386. Issues raised and decided on direct appeal cannot ordinarily be relitigated in a collateral proceeding based on 28 U.S.C. § 2255. *See United States v. McGee*, 201 F.3d 1022, 1023 (8th Cir. 2000) (*per curiam*).

The district court recognized this well established principle in refusing to grant Mr. Wiley a new trial on the basis of the trial judge's incompetence, but thought that the miscarriage-of-justice exception to the rule against relitigating matters decided on direct appeal required a reexamination of the sentence. We do not think that any such distinction is tenable, but in any event we hold that the exception invoked by the district court is not available in the present context. We have recognized such an exception only when petitioners have produced convincing new evidence of actual innocence, *see, e.g., Weeks v. Bowersox*, 119 F.3d 1342, 1350-51 (8th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1093 (1998), and *McDaniel v. Norris*, 38 F.3d 385, 386 (8th Cir. 1994), *cert. denied*, 516 U.S. 826 (1995), and the Supreme Court has not extended the exception to situations beyond those involving a petitioner's actual innocence. Indeed, the Court has emphasized the narrowness of the exception and has expressed its desire that it remain " 'rare,' " *Schlup v. Delo*, 513 U.S. 298, 321 (1995), quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (opinion of Powell, J.), and available only in the " 'extraordinary case,' " *Schlup*, 513 U.S. at 321, quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

We conclude that Mr. Wiley's constitutional claim is not so different from other constitutional claims that the miscarriage-of-justice exception to the finality rule ought to be extended to him. If it is available to him, we see no convenient stopping point, for it would be available to any § 2255 petitioner whose constitutional claim had already been decided.

Here Mr. Wiley has produced no new evidence that he is actually innocent. Even if he had produced new and convincing evidence that he is actually innocent of the sentence imposed, which he did not, he could not prevail because we have held that the actual-innocence exception does not apply to noncapital sentences. *See Embrey v. Hershberger*, 131 F.3d 739, 740-41 (8th Cir. 1997) (*en banc*), *cert. denied*, 525 U.S. 828 (1998). What Mr. Wiley in fact produced to the trial court was new evidence (in the form of affidavits from jurors, lawyers, persons who attended Mr. Wiley's trial, and Mr. Wiley himself) tending to show that the sentencing judge was incompetent, and, as we have said, such evidence cannot provide a sufficient reason to overlook the fact that Mr. Wiley already raised the issue of the judge's incompetence on direct appeal and lost.

We concede that there may be at least a theoretical difference between an ability, on the one hand, to appreciate and apply legal rules, and an ability, on the other hand, to find facts and weigh considerations that bear on an appropriate length for a sentence. But Mr. Wiley did not argue this distinction as an explanation for the district court treating his claim for a new trial differently from his claim that he deserved to be resentenced. Even if he had, the question would arise whether the § 2255

petition should not have been dismissed for failure to raise on appeal a separate and distinct claim that he was entitled to resentencing. *See United States v. Bailey*, 235 F.3d 1069, 1071-72 (8th Cir. 2000).

For the reasons indicated, we vacate the sentence and remand to the district court with instructions to reinstate Mr. Wiley's original sentence of 188 months.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee,
v.
Jeffrey WILEY, Appellant,
UNITED STATES of America, Appellee,
v.
Curtis HOLUB, Appellant.

Nos. 92-2469, 92-2497.

Submitted Jan. 14, 1993.
Decided June 28, 1993.

Nancy Hollander, Albuquerque, NM, argued, for Jeffrey Wiley.

John Wesley Hall, Jr., Little Rock, AR, argued, for Curtis Holub.

Steven M. Colloton, Asst. U.S. Atty., Cedar Rapids, IA, argued (Patrick J. Reinert, Asst. U.S. Atty., on the brief), for U.S.

Before RICHARD S. ARNOLD, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

RICHARD S. ARNOLD, Chief Judge.

Jeffrey Wiley and Curtis Holub appeal their convictions and sentences for distribution of marijuana and other related offenses. We affirm.

I.

Wiley owned and operated a motorcycle shop in Marion, Iowa. In addition to repairing motorcycles, Wiley

used the business to store and distribute marijuana. He served as a source in a drug conspiracy involving Holub and several others.

Early in 1988, federal drug-task-force agents began investigating this conspiracy. On February 11, Chris Mottinger, who was cooperating with the agents and wearing a recorder, obtained a sample of marijuana from Holub at Holub's home. A few days later, an informant named Newland recorded a conversation between himself, Kevin Meggers, and Wiley, in which they discussed Wiley's drug trafficking. Another cooperating individual, Barton Hoffman, recorded a conversation between himself and Meggers, in which Meggers described Wiley's drug activities. On February 19, Holub sold one pound of marijuana to Mottinger and an undercover agent. He also negotiated another sale with the agent of 50 pounds of marijuana, which was to occur on February 22. On that day, Holub went to Meggers's house to get the marijuana. Wiley was supposed to have delivered it to Meggers. Meggers did not have the marijuana, and the sale between the agent and Holub never took place. At this same time, Pat McMickle was purchasing 82 pounds of marijuana from Wiley at Wiley's shop. McMickle testified that Wiley sold to him rather than to Meggers because Wiley thought McMickle was a better salesman.

McMickle immediately sold the marijuana to an undercover agent and was arrested. He agreed to cooperate and identified Wiley as the person who sold him the marijuana. McMickle also told Agent Badger that Wiley had more marijuana stored in the garage. In cooperation with the federal task force, McMickle returned to Wiley's

shop wearing a recorder and told Wiley that the purchasers had not shown up. Shortly thereafter, agents approached and took both McMickle and Wiley into custody.

The agents took Wiley to a motel room, told him they had seized the 82 pounds of marijuana from McMickle, and said they were interested in his cooperation. Although no one advised Wiley of his rights under *Miranda*, Agent Badger testified that he informed Wiley that if he agreed to cooperate and plead guilty to conspiracy to distribute marijuana, the statements he made would not be used "to formulate additional charges." Wiley claims, however, that Agent Badger said that the information he provided would not be used against him at all. At any rate, Wiley talked and also consented to a search of his business. He gave names of others to whom he was dealing drugs and a very brief sketch of their activities.[1] In the motorcycle shop, Wiley gave them over 30 pounds of marijuana, scales, and a notebook of drug-transaction records. Wiley later decided not to cooperate.

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[1] Of the half-dozen persons mentioned by Wiley in his statement, only one, Patrick McMickle, testified against him at trial. McMickle was an employee of the motorcycle repair shop. Wiley indicated in his statement that he had been dealing with McMickle since August of 1987, and that there had been approximately ten one-pound deals, six five-to-ten-pound deals, six 25-pound deals, and four 50-pound deals. The largest deal was the 82 pounds picked up that night.

On September 26, 1991, a grand jury indicted Holub,[2] Wiley, and two others, Ronald Tank and Craig Pflughaupt.[3] Count 12 charged all four of them with conspiracy to distribute marijuana. In Counts 1, 2, 3, 5, 8, and 9, the indictment charged that Holub used a communications facility to facilitate the distribution of marijuana. Holub was also charged with two counts of distributing marijuana, Count 4 and Count 6. Count 7 charged Wiley with distribution of 82 pounds of marijuana, and Count 10 charged him with possession of an additional 30 pounds with the intent to distribute. In Count 11, the indictment charged that Wiley managed and controlled a building for the purpose of storing and distributing a controlled substance. Finally, Count 13 sought the forfeiture of Wiley's business. Holub entered a conditional plea of guilty to Counts 1, 4, 6, and 8, reserving the issue of whether the first indictment should have been dismissed with prejudice under the Speedy Trial Act. Wiley went to trial and was convicted by a jury of Counts 7, 10, 11, and 12. The Court sentenced Wiley to 188 months' imprisonment, three years' supervised release, an $83,200 fine, and a $50 special assessment on each of the four counts. The jury also found that his business was forfeitable. These appeals followed.

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[2] Holub had already been indicted in a nine-count indictment on December 14, 1988. The District Court dismissed this indictment without prejudice on May 30, 1991, for violation of the Speedy Trial Act.

[3] Tank and Pflughaupt pleaded guilty, cooperated with the government, and are not involved in this appeal.

II.

Wiley first contends that the District Court erred in denying his motion to dismiss the indictment because the government used immunized statements against him in violation of the immunity agreement between him and the government. Wiley argues that Agent Badger told him that the information he provided would not be used against him. The government claims that Agent Badger told Wiley that the information he provided would not be used to formulate additional criminal charges against him – that is, in addition to charges about which the government already had information – but would be provided to the Court as part of the relevant conduct for sentencing. After a two-day hearing on the issue, the District Court believed the government as to the substance of the agreement and held that enough information existed before Wiley gave his statement to charge him with the four crimes charged in the indictment. The Court also held that the government did not use information provided by Wiley to formulate additional charges. We are persuaded neither that the Court's finding as to the substance of the agreement is clearly erroneous nor that its holding regarding the use of that agreement is in error.

A.

On the substance-of-the-agreement issue, Wiley argues that since agents Knott and Noonan testified that the standard procedure at that time was to grant full use immunity, the District Court's finding believing Agent Badger is clearly erroneous. We disagree. As a preliminary matter, we note that it is very difficult to prove that

a court's assessment of credibility was clearly erroneous when that court, not this Court, had the opportunity to observe and listen to the witnesses. Agent Badger, not Captain Noonan or Lieutenant Knott, was responsible for conveying the terms of the cooperation agreement to Wiley. Knott was not even present when this was done, and Noonan admitted that he did not know the details of the agreement. We see no clear error. Wiley's contention that written agreements between the United States Attorney's Office and other defendants contained different terms also does not convince us that the District Court's finding with regard to Wiley's oral agreement is clearly erroneous. There was no written agreement between the government and Wiley, and certainly no overwhelming evidence that the government would treat Wiley, an arguably bigger fish, as it treated these other defendants.

B.

On the use-of-the-statement issue, Wiley points to the following "uses" of his statement in violation of the immunity agreement: the government used his statement to induce Pat McMickle to testify; the government used his statement in formulating its strategy before the grand jury and at trial, determining which witnesses to call, deciding what evidence to present to the grand jury, and shaping its theory of prosecution; the government failed to prove that its evidence was obtained independently of the statement; and the government told the grand jury that Wiley made a statement admitting his guilt and later withdrew his cooperation. We reject Wiley's contentions.

First, McMickle had already decided to cooperate and implicate Wiley before he learned that Wiley had provided information on him. In fact, McMickle gave information on Wiley before Wiley was even arrested or questioned. In any event, the proof is substantial that McMickle's motive for assisting the government was solely to reduce his own sentence. Trial Transcript 722-23. Second, after an exhaustive review of the Motion to Dismiss Hearing Transcript and the Trial Transcript, we affirm the District Court's holding that there was abundant evidence gathered by the government through independent means, precluding us from concluding that the government's use of Wiley's statement in shaping its case, if it did so, had any effect on Wiley's substantial rights.

Next, we reject Wiley's claim that the government did not prove that the trial testimony of each witness was derived from a wholly legitimate, independent source. In rejecting this claim, the District Court explained that the argument ignored the nature of the agreement. We agree. The agreement here was not that the government would not use Wiley's statement, but that the government would not use Wiley's statement to formulate additional charges against him, and it didn't. Had the government brought charges in addition to the four charges supported by the evidence on February 22, 1988, it would have had to prove that the new charges were based on evidence that was derived from a "legitimate source wholly independent of the compelled testimony." *Kastigar v. United States*, 406 U.S. 441, 460, 92 S.Ct. 1653, 1665, 32 L.Ed.2d 212 (1972). Here, there was no requirement that the government prove this. In any event, we agree with

the District Court that the transcript of the Motion to Dismiss Hearing shows that the burden would have been met. See Motion to Dismiss Hearing Transcript 59-62, 75, 80-81, 100, 118, 194, 219.

Finally, Wiley contends that his statement was used at the grand jury when the government – by suggesting that Wiley had given a statement and then stopped cooperating – basically told the grand jury that Wiley had admitted his guilt. We do not agree with Wiley that this was a prohibited use of his statement. A member of the grand jury asked Agent Weisman why he was terminating the investigation into Wiley's suppliers. Agent Weisman's response was "it's just getting old and people really do start forgetting things and it starts to get more difficult to conduct an investigation." Grand Jury Testimony of Agent Weisman 6. An assistant United States Attorney then interjected that Wiley was approached with the possibility of cooperating and providing information on his sources, but that he eventually decided not to cooperate. *Ibid.* Weisman agreed and said "[h]e was debriefed on a day that he was confronted with the deal, and he provided some information, and then he got an attorney, and . . . stopped cooperating." *Id.* at 6-7. While we have doubts about this tactic on the part of the government, it is not a prohibited use of Wiley's statement. The substance of the agreement was not brought to the attention of the grand jury, nor was the statement used to formulate additional charges against him.

III.

Wiley's next contention is that the District Court erred in denying his motion to suppress the evidence seized from his business. He claims that the seizure was tainted by the prior interrogation of him in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). We agree with the District Court that a violation of *Miranda* occurred. The police handcuffed Wiley, took him to a motel room, and questioned him without reading him his rights as required by *Miranda*. That, however, is not the end of the analysis.

In *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the Supreme Court rejected a fruit-of-the-poisonous-tree argument and held that a second confession, given after a proper *Miranda* warning, was admissible, although it came on the heels of an unwarned statement. The Court distinguished presumptive coercion, resulting from the absence of *Miranda* warnings, from actual coercion, resulting from improper police behavior. Unwarned statements, explained the Court, may be voluntary in fact. *Id.* at 307, 105 S.Ct. at 1292. If the unwarned statement was voluntary, and the allegedly tainted second statement was also voluntary, the second, warned statement is admissible. The Fifth Amendment, stated the Court, prohibits only the use of compelled testimony. *Id.* at 306-07, 105 S.Ct. at 1291-92.

Indirectly relying on *Elstad*, on facts similar to those here, this Court upheld the suppression of physical evidence obtained from a consensual search following an unwarned statement. See *United States v. Carter*, 884 F.2d

368 (8th Cir.1989). The Court reasoned that the government failed to prove that the consent was voluntary. We assume that if the Court had found the consent to be voluntary, the alleged "taint" would not have prevented the Court from admitting the evidence. By analogy to *Elstad* and *Carter*, the evidence seized here was admissible if both the unwarned statement and the consent to search were voluntary. The District Court's holding that they were is not clearly erroneous. The agents uncuffed Wiley in the motel room, told him he could consult with an attorney, and explained to him the benefits of cooperation. He chose to give a statement. For these same reasons, plus the fact that Wiley signed a consent-to-search form after having it explained to him, and the fact that during the search he gave the agents all of the inculpatory evidence, we agree with the District Court that Wiley consented to the search. We do not believe this consent was tainted by the earlier *Miranda* violation.

We also reject Wiley's related claim that the District Court erred in denying his motion to suppress evidence that he turned over his notebook to the police. The notebook contained records of his drug transactions. The argument is that his act of turning over the notebook was testimonial in nature, that is, "the notebook exists and it belongs to me." Since the agents did not first give the *Miranda* warnings, this testimony, argues Wiley, must be suppressed. This is the first time Wiley has made this specific objection. Before, he merely included the notebook in his objection to the search generally. The point is therefore not open for normal review on appeal, and we see no plain error in the ruling of the District Court.

IV.

Wiley's next contention is that the District Court erred in denying his motions to voir dire the jury, preserve the jurors' notebooks, and declare a mistrial because of juror misconduct. Apparently, several jurors were overheard mentioning the materials compiled by the government to comply with *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957), which requires the government to make available to the defense statements made by government witnesses. When the judge explained that the jurors could send him a note if they needed to speak with him about anything, one juror sent a note asking what the *Jencks* files were, if the jury could see them, and what happened to Exhibit 68. Trial Transcript 615-16. Another juror asked the courtroom clerk what Exhibit 68 was and said "we've been trying to figure it out." Trial Transcript 607-08. Wiley moved for a mistrial and also requested the Court to voir dire the jury. Finding no reason to believe that the jurors had been discussing the merits of the case, the Court decided to give a cautionary instruction rather than grant Wiley's motions.

The parties do not dispute that a district court has broad discretion in handling allegations of juror misconduct. See, *e.g.*, *United States v. Baker*, 855 F.2d 1353, 1361 (8th Cir.1988), *cert. denied*, 490 U.S. 1069, 109 S.Ct. 2072, 104 L.Ed.2d 636 (1989); *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.), *cert. denied*, 434 U.S. 818, 98 S.Ct. 58, 54 L.Ed.2d 74 (1977). We will not reverse its determination of whether there has been misconduct, and if so, its actions in handling the matter, absent an abuse of discretion. We see no abuse of discretion here.

V.

We next address Wiley's contention that there was insufficient evidence to establish that his business facilitated the crimes and that, therefore, this Court must reverse the forfeiture. While Wiley concedes that the evidence established a sufficient connection between the physical property and the criminal activity, he argues that there was no evidence that the actual business operation was used to commit or facilitate any crimes.

Our standard for reviewing the jury's finding of forfeiture is whether, in the light most favorable to the prosecution, any reasonable jury could have found the property forfeitable beyond a reasonable doubt. See *United States v. Cook*, 972 F.2d 218, 221 (8th Cir.1992), *cert. denied*, 506 U.S. 1058, 113 S.Ct. 991, 122 L.Ed.2d 142 (1993). The evidence here showed that McMickle, one of Wiley's main marijuana distributors, worked for Jeff Wiley Enterprises. One could certainly infer that this employment situation facilitated their contacts for redistribution activities. McMickle also called the business from Wisconsin to discuss a drug transaction. In addition, the business had many legitimate customers, thus providing a cover for the drug traffickers who frequented the business. We uphold the jury's verdict of forfeiture.

VI.

We now address Holub's contentions that the District Court erred in denying his motion to dismiss on the basis of a violation of his Sixth Amendment right to a speedy trial and in dismissing without prejudice the charges

against him because of the government's violation of the Speedy Trial Act, 18 U.S.C. §§ 3161, 3162.

Holub was indicted on December 14, 1988, and the trial, initially scheduled for February 28, 1989, was postponed by order of the magistrate judge on February 27, 1989. The reason for the continuance was that the government and Holub's attorney, Stanley Roush, thought – albeit incorrectly – that they had reached a plea agreement. Negotiations continued through the fall of 1990. Apparently, the government sent a plea agreement to Roush in March of 1989 for Holub's signature. Holub told Roush that he rejected the offer, but Roush did not tell the government of the rejection until April of 1990. Roush explained that the delay was caused by Holub's telling him that he had personally called the United States Attorney's office to reject the offer and his informing Roush that he wanted a court-appointed attorney and a trial. Roush also knew that Holub had been receiving legal advice from an attorney in Washington, D.C. For the government's part, it failed to monitor the situation diligently. When the government finally learned in April 1990 of Holub's rejection of its offer, it made another offer through Roush, which Roush communicated immediately by letter to Holub. Holub did not respond. Finally, the government set a deadline of September 13, 1990, after which it would ask the Court to set the matter for trial. After receiving no response to his letters to Holub, Roush withdrew as counsel. The Court appointed new counsel and set the trial for March 19, 1991. The new counsel withdrew, and another attorney was appointed on February 8, 1991.

On February 20, 1991, Holub, through his third attorney, moved to dismiss the charges against him on the ground that the government had failed to bring him to trial within the time required by the Speedy Trial Act. He also moved for a dismissal under the Sixth Amendment. The magistrate judge found no Sixth Amendment violation, but recommended that the charges be dismissed with prejudice because of the government's violation of the Speedy Trial Act. The District Court agreed that the Act had been violated, but on March 31, 1991, dismissed the charges without prejudice.

On September 26, 1991, the government reindicted Holub. The District Court adopted the magistrate judge's Report and Recommendation finding that Holub had suffered no prejudice from the delay and denied his renewed motion to dismiss with prejudice on speedy-trial grounds. Holub then entered a conditional guilty plea to four counts. He now appeals from the denial of his motion to dismiss.

A.

First, Holub's claim that the District Court erred in denying his motion to dismiss based on the Sixth Amendment is not properly before us. Holub's conditional plea of guilty merely preserved his right to challenge the District Court's failure to hold that the charges from the first indictment should have been dismissed with prejudice under the Speedy Trial Act, thereby precluding the charges in this case. Government's Appendix 142. He did not preserve or raise the Sixth Amendment issue in his plea or before the court below. Federal Rule of Criminal

Procedure 11(a)(2) specifically provides that a defendant may enter a conditional plea of guilty

> [w]ith the approval of the court and the consent of the government . . . reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. . . .

Since the only written reservation concerned the Speedy Trial Act claim, we will not address Holub's Sixth Amendment claim.

B.

Second, Holub argues that the District Court should have dismissed the first indictment with prejudice instead of without prejudice. Thus, he argues, the government should have been precluded from bringing the charges against him here.

When a district court finds a violation of the Speedy Trial Act, dismissal is mandatory. 18 U.S.C. § 3162(a)(2). The Act does not, however, require dismissal either with or without prejudice, and we will not disturb the District Court's ruling on the issue absent an abuse of discretion. *United States v. Kramer*, 827 F.2d 1174, 1179 (8th Cir.1987). The Act sets out the following factors for a court to use in determining whether to dismiss with or without prejudice:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal;

> and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

18 U.S.C. § 3162(a)(2).

The District Court held that the charges against Holub were serious. Addendum to Holub's Brief 29. The Court also found that the cause of the delay was the government's failure to follow up on its proposed plea offers and Holub's failure to communicate his rejections of the offers to the government. *Ibid.* The Court further found that Holub had not been prejudiced by the delay and that the government had no history of delaying trials in that area. *Id.* at 30. For those reasons, the Court held that dismissal without prejudice was appropriate. Its holding is not an abuse of discretion.

VII.

Next, the defendants challenge their sentences on various grounds. One of Wiley's contentions – that hearsay introduced at the sentencing hearing violated his right of confrontation under the Sixth Amendment – was disposed of by our decision in *United States v. Wise*, 976 F.2d 393 (8th Cir.1992) (en banc) (holding that the Confrontation Clause does not apply to the sentencing hearing), *cert. denied*, 507 U.S. 989, 113 S.Ct. 1592, 123 L.Ed.2d 157 (1993). His second contention is that the basis the Court used to calculate the drug quantity when determining his base offense level was arbitrary, unreliable, and unrelated to the crime of which he was convicted. The sentencing court may take into account drugs not specified in the counts of conviction if those drugs were "part

of the same course of conduct or common scheme or plan." U.S.S.G. § 1B1.3(a)(2). Furthermore, the quantity need be established only by a preponderance of the evidence, and we will not reverse the sentencing court's determination of drug quantity unless the defendant proves that determination is clearly erroneous. Wiley has not done that here.

Wiley claims that there was no evidence at the sentencing hearing to prove that the marijuana distributed by Don Raymond and Kevin Meggers was obtained from him. The government did, however, present evidence at trial that Wiley was the source of this marijuana. Trial Transcript 308, 579-80, 589-90, 834, & 881-83. Most of the drug-quantity evidence came in the form of testimony from Patrick McMickle, who Wiley claims was addicted to cocaine during the relevant time period and is completely unreliable. The District Court disagreed, and found McMickle to be a credible and reliable witness. We are not persuaded that the Court's finding on this issue is clearly erroneous.

In addition, we see no merit to Wiley's claim that the District Court erred in enhancing his offense level by two levels for obstruction of justice. The District Court believed the witnesses' testimony that Wiley threatened them with physical harm if they testified, and, once again, we cannot say this finding is clearly erroneous. Such a threat is clearly sufficient to justify the enhancement.

Finally, Holub challenges the two-level increase in his offense level under U.S.S.G. § 2D1.1(b)(1) for possession of a firearm. He does not contend that he did not

possess a firearm, but that the government did not prove the firearm was connected to the offense. Mottinger, a wired government informant, went to Holub's house to discuss a marijuana deal. When the two of them entered Holub's bedroom, Mottinger noticed a 9-millimeter gun in an open gun safe near the bed. We will assume that Holub is correct that the gun was not loaded, although he testified that he could load it and be ready to fire it in four or five seconds. In any event, Mottinger handled the gun for a moment, and then Holub returned it to the safe. A few minutes later, they went back to the living room, where Holub gave Mottinger the marijuana sample.

Holub argues that the enhancement does not apply since the gun had nothing to do with the drug transaction and was not even in the room where the transaction occurred. We agree that the gun was not involved in the sense that Holub did not directly threaten Mottinger with it to consummate the sale. The question here, however, is whether it is "clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, Application Note 3. The District Court's finding that it was not clearly improbable is to clearly erroneous. See *United States v. Streeter*, 907 F.2d 781, 792 (8th Cir.1990) (court upheld enhancement where unloaded guns were found on ground floor and marijuana found in attic); *United States v. Haren*, 952 F.2d 190, 198 (8th Cir.1991) (court upheld enhancement where guns were found in mobile home adjacent to sheds which served as the amphetamine labs).

VIII.

Finally, defendants have submitted a portion of their briefs under seal, together with excerpts from the transcripts and related materials. We have considered the arguments made under seal with care. They are serious arguments. After considering all of the relevant factors, we hold that no error occurred affecting defendants' substantial rights.

The judgments are affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JEFFREY WILEY, Defendant.	)	No. CR 91-9-MWB **REPORT AND RECOMMENDATION AND ORDER**

(Filed Jan. 27, 1999)

I. INTRODUCTION

This matter comes before the court pursuant to the April 22, 1997, petition by defendant Jeffrey Wiley ("Wiley") under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (Docket No. 472). On May 15, 1997, by order of the Honorable Mark W. Bennett, this matter was referred to the undersigned United States Magistrate Judge (Docket No. 475) pursuant to 28 U.S.C. § 636(b)(1)(B) for the filing of a report and recommended disposition of the motion. On June 5, 1997, the United States ("government") filed an answer and motion to dismiss Wiley's petition (Docket. No. 477). On September 3, 1997, the government filed a second motion to dismiss (Docket. No. 488), and on September 24, the government filed a motion for summary judgment (Docket. No. 494). Wiley filed a response to the government's motions on November 4, 1997 (Docket. No. 497). Also, on July 21, 1997, Wiley filed a motion for issuance of subpoenas

duces tecum (Docket. No. 480). After careful consideration of the arguments of counsel, the relevant case law, and the record as a whole, the court makes the following rulings.

II. PROCEDURAL AND FACTUAL BACKGROUND

In early 1988, law enforcement agents directed an undercover investigation at a suspected marijuana distribution conspiracy. The conspiracy consisted of a number of individuals and focused its distribution in Cedar Rapids, Iowa, and Green Bay, Wisconsin.

On February 19, 1988, Curtis Holub ("Holub") sold one pound of marijuana to undercover law enforcement agents. Holub and the agents also negotiated a subsequent deal involving fifty pounds of marijuana to take place on February 22, 1988. Wiley was supposed to supply the fifty pounds to Kevin Meggers ("Meggers"), another coconspirator, who was then to give it to Holub to sell to the undercover agents. When the day of the transaction arrived, Holub went to Meggers's house to get the marijuana only to find that Wiley had not kept up his part of the deal. At this same time, however, Wiley sold eighty-two pounds of marijuana to Pat McMickle, another coconspirator, who, in turn, sold it to an undercover agent. Law enforcement agents then arrested McMickle.

McMickle agreed to cooperate with law enforcement and identified Wiley as his source for marijuana. As part of his cooperation, McMickle returned to Wiley's motorcycle shop and recorded a conversation with Wiley in

which they discussed the recent transaction involving the eighty-two pounds of marijuana. Law enforcement then detained Wiley and requested his cooperation. Wiley consented to an interview and a subsequent search of his motorcycle shop. At the shop, law enforcement agents found over thirty pounds of marijuana, scales, and a notebook of drug records.

Wiley later discontinued his cooperation with law enforcement, and a grand jury indicted him on September 26, 1991, on drug charges. Wiley went to trial and was convicted after a jury trial. The court sentenced Wiley to 188 months of imprisonment, three years of supervised release, an $83,200 fine, and a $50 special assessment on each of the four counts of which he was convicted. The court also ordered the forfeiture of Wiley's motorcycle repair shop.

Wiley appealed directly to the Eighth Circuit Court of Appeals. The court rejected Wiley's appeal and affirmed his conviction and sentence. *United States v. Wiley*, 997 F.2d 378 (8th Cir. 1993). Wiley petitioned the United States Supreme Court on the sole issue of the mental capacity of the trial judge. The Court denied Wiley's petition on December 6, 1993. *United States v. Wiley*, 114 S.Ct. 600, 510 U.S. 1011, 126 L.Ed.2d 565 (1993).

In his section 2255 petition, Wiley raises the following issues: (1) that he was denied the right to a fair trial; (2) that his trial counsel was ineffective; (3) that his appellate counsel was ineffective; and (4) that he should be resentenced.

III. LEGAL ANALYSIS

A. Right to a Fair Trial

Wiley alleges that the judge who presided over his trial[1] suffered from a mental defect that made him unfit to preside, thus violating Wiley's due process right to a fair trial. Such a defect, Wiley argues, affected the judge's decision-making abilities and processes and forced him to compensate for the defect by relying on the opinions of the government to make all of his decisions. In support of his argument, Wiley points to: (1) an affidavit containing comments made to an attorney/investigator hired by Wiley from anonymous attorneys who practiced before the judge in his home state; (2) affidavits of two mental health professionals who reviewed portions of transcripts from several trials in which the judge had presided; (3) affidavits from three jurors in Wiley's trial; (4) affidavits from two people who were present during parts of Wiley's trial; (5) an affidavit from Wiley; (6) affidavits from Wiley's trial attorneys; and (7) the fact that the judge's caseload was taken from him one-and-a-half years after Wiley's trial.

Initially, Wiley must show why this claim is not procedurally barred. A defendant may not relitigate an issue that has been raised and decided on direct appeal. *See Dall v. United States*, 957 F.2d 571, 572 (8th Cir. 1992) (per curiam). Wiley raised essentially the same argument in his direct appeal as he raises in his section 2255 petition, and the Eighth Circuit Court of Appeals rejected it with the following language:

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[1] The trial judge was a visiting judge from another state.

> Finally, defendants have submitted a portion of their briefs under seal, together with excerpts from the transcripts and related material. We have considered the arguments made under seal with care. They are serious arguments. After considering all of the relevant factors, we hold that no error occurred affecting defendant's substantial rights.

United States v. Wiley, 997 F.2d at 386.

Wiley argues that the specificity of his present argument distinguishes it from the argument he made in his direct appeal, but a close look at both arguments belies this contention. In his direct appeal, Wiley alleged that the trial judge was mentally incompetent during Wiley's trial. He supported his allegation with an affidavit by a mental health professional who examined portions of the transcript from Wiley's trial. The only difference between the mental incompetence allegation made on direct appeal and the one made in Wiley's § 2255 petition is the proof Wiley posits to support his contention. The fact that no substantive difference exists between the claims themselves leads to the conclusion that the claims are the same and, thus, procedurally barred.

Wiley argues, in the alternative, that he fits within an exception to the procedural bar rule because he has offered new evidence supporting his section 2255 claim. However, "[n]ewly discovered evidence cannot be the basis for habeas relief absent a showing that it 'would probably produce an acquittal on retrial.' " *Larson v. United States*, 905 F.2d 218, 221 (8th Cir. 1990) (quotations and citations omitted). Wiley makes no such showing. In

fact, he had failed to even demonstrate that any particular decision by the trial judge during the trial was wrong, or that if the trial judge had made a different decision on any particular matter Wiley would have probably been acquitted. In fact, the record demonstrates that the evidence of guilt was so overwhelming that the jury's guilty verdicts would not likely have been different despite a different ruling by the trial judge on all of the difficult evidentiary decisions by the trial judge at trial. *cf. United States v. Raether,* 82 F.3d 192, 194 (8th Cir.1996) (finding harmless error when "jury's actual finding of guilty . . . would surely not have been different absent the constitutional error.") (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 280, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993). Thus, Wiley is not entitled to invoke the "new evidence" exception to the procedural bar rule.

Wiley contends that procedurally barring his claim would result in a manifest miscarriage of justice. However, Wiley's failure to raise an argument regarding his actual innocence bars his claim under the miscarriage of justice exception. The Eighth Circuit Court of Appeals has stated that "an error of law does not provide a basis for collateral attack unless the claimed error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.' " *Embrey v. Hershberger,* 131 F.3d 739, 741 (8th Cir.) ("[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence.") (quoting *Sawyer v. Whitley,* 505 U.S. 333, 339, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992)), *cert. denied,* ___ U.S. ___, 119 S.Ct. 78, ___L.Ed.2d___ (1998). Therefore, Wiley is not entitled to invoke the "miscarriage of justice"

exception to the procedural bar rule to overturn his conviction.

B. Ineffective Assistance of Trial Counsel

Wiley argues that his trial attorneys, Nina Ginsburg ("Ginsburg") and Nancy Hollander ("Hollander"), provided ineffective assistance of counsel in violation of his Sixth Amendment rights. Specifically, Wiley points to: (1) his attorneys' failure to investigate the trial judge's reputation for mental competency, and (2) his attorneys' failure to make a motion to remove or disqualify the trial judge.

1. Standard for ineffective assistance of counsel

Wiley is entitled to effective assistance of counsel at trial. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. In other words, to prevail on a claim of ineffective assistance of counsel, Wiley must show cause and prejudice: that his attorneys' assistance "fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel[s'] unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694, 104 S.Ct. at 2064, 2068.

a. cause

In order to show that Ginsburg's and Hollander's conduct amounted to cause, Wiley must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. at 2065. Ginsburg and Hollander submitted affidavits declaring that their failure to investigate other cases or instances where the trial judge had appeared to be mentally incompetent amounted to ineffective assistance of counsel. They further stated that their failure, even upon request by Wiley, to move for the trial judge's removal or disqualification provided additional proof of professional conduct constituting ineffective assistance of counsel.

The court has carefully read the entire transcript of Wiley's trial. The court agrees that trial counsel would have been justified in challenging the competence of the trial judge. However, the court does not need to decide whether trial counsels' failure to do so, or whether their failure to conduct an investigation of the judge's competence, satisfied the cause prong of *Strickland's* test for ineffective assistance of counsel because the court finds that Wiley has not satisfied the prejudice prong. *See United States v. Williams*, 994 F.2d 1287, 1291 (8th Cir. 1993) (holding court need not decide cause if petitioner fails to show prejudice).

b. prejudice

Even if Wiley could show that his trial counsels' actions, or inactions, amounted to deficient performance

rising to the level of cause, he cannot show prejudice. To establish prejudice, Wiley must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. In making this determination, the court must take into account "whether the result of the proceeding was fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993).

Wiley argues that trial judge's alleged organic brain disorder at the time of trial forced the judge to rely on the opinions of the government to make his rulings. To support his contention, Wiley points to the fact that prior to trial the defense submitted thirteen motions, and they were all denied. Wiley also relies on a comparison of the objections raised by counsel at trial. The defense raised ninety-nine objections at trial, ninety-seven of which were overruled; the government raised thirty objections at trial, twenty-seven of which were sustained.

Of course, a scorecard of rulings on objections and pretrial motions does not support an allegation of prejudice. *See Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994) ("judicial rulings alone almost never constitute [a] valid basis for a bias or partiality motion."). In any event, the court has reviewed the trial judge's rulings on all of the objections made during trial and his rulings on all of the pretrial motions and does not find any of them to be clearly erroneous.[2] The

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[2] In fact, this court has carefully examined the entire transcript and agrees with most of the trial judge's rulings

Eighth Circuit Court of Appeals rejected Wiley's direct appeal, in which many of the trial judge's pretrial and trial rulings were challenged. There is simply nothing in the record to show that Wiley was prejudiced by any particular ruling in the case. *Raether*, 82 F.3d at 194. For these reasons, and those already discussed, *see supra* Part III.A., Wiley fails to establish prejudice. Thus, his claim of ineffective assistance of counsel must fail.

C. Ineffective Assistance of Appellate Counsel

Wiley also argues that Hollander and Ginsburg provided ineffective assistance of counsel in hi direct appeal. He bases this claim on Hollander's and Ginsburg's failure to fully investigate the trial judge's alleged mental incompetence before presenting the issue to the Eight [sic] Circuit Court of Appeals. Essentially, Wiley states that the investigation his attorneys did perform was so insufficient that it made his allegations against the trial judge seem like a "cheap shot," and wasted his appeal.

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during the trial, and finds that none of the close or questionable rulings, either individually or collectively, had a substantial bearing on the results in the trial. As to the score-keeping on the judge's rulings on objections, many of the trial objections by defense counsel were to preserve claims of error under the *Bell* procedures (*United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978)), and many others were to preserve objections made in pretrial motions that had been overruled. Furthermore, most of the pretrial rulings were actually made by the magistrate judge by report and recommendation, and were simply adopted by the trial judge.

"A criminal defendant is entitled to effective assistance of counsel on a first appeal as of right." *Rogers v. United States*, 1 F.3d 697, 700 (8th Cir. 1993) (quotations omitted). The same standard that applies to claims of ineffective assistance of trial counsel also applies to claims of ineffective assistance of appellate counsel. That is, but for counsel's alleged errors, there is a reasonable probability that the results of the proceedings would have been different. *See, e.g., Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. To satisfy the cause prong of the *Strickland* test, Wiley must show that his appellate counsels' "decision was an unreasonable one which only [incompetent attorneys] would adopt." *Garrett v. United States*, 78 F.3d 1296, 1305 (8th Cir. 1996).

Under the facts of this case, Wiley cannot establish cause. Hollander and Ginsburg supported their appellate arguments regarding the trial judge's mental capacity by providing the court of appeals with excerpts from the transcripts of Wiley's trial and sentencing. They also submitted the affidavit of a mental health professional who analyzed the excerpts. Their decision to rely on the excerpts, and the analysis of those excerpts, from Wiley's trial was not unreasonable. *See Strickland*, 466 U.S. at 668, 104 S.Ct. at 2065 (attorney obligated to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). The court believes that appellate counsels' investigation was adequate, and therefore that Wiley cannot show cause.

Even if the court were to find that Wiley has established cause, he cannot establish prejudice. "Unreliability or unfairness does not result if the ineffectiveness of

counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart*, 506 U.S. at 372, 113 S.Ct. at 844. Wiley's section 2255 petition is supported by evidence Wiley contends was available to his appellate counsel and should have been presented as a part of his appeal. In this case, the court finds that the additional evidence would not have caused the court of appeals to have reached a different outcome. Wiley received an effective direct appeal, and was not prejudiced by the deprivation of any substantive or procedural rights entitled to him by law.

D. Calculation of Wiley's Sentence

As his final claim, Wiley challenges his sentence, arguing that, in computing his sentence, the sentencing court attributed improper amounts to him. Wiley bases his argument on the reliability of a co-conspirator's claim that Wiley participated in large marijuana transactions not mentioned in the indictment.

In his direct appeal, Wiley raised this same argument, and court of appeals rejected it. *See Wiley*, 997 F.2d at 386. Generally, a defendant may not relitigate an issue that has been raised and decided on direct appeal. *See Dall v. United States*, 957 F.2d 571, 572 (8th Cir. 1992) (per curiam). Wiley is therefore procedurally barred from reasserting this argument. *See United States v. Bowers*, 21 F.3d 843, 844 (8th Cir. 1994) (per curiam) (applying law of case doctrine to bar argument previously rejected on direct appeal).

However, the court finds that the manifest miscarriage of justice exception to the procedural bar rule should be applied here, and that Wiley should be resentenced. Wiley has presented a sufficient record to this court to support his claim that, during sentencing, the trial judge might not have exercised appropriate judgment, and the court finds that there is a reasonable probability that Wiley would have received a different sentence if the trial judge had been better able to evaluate the evidence presented at sentencing.[3] As the court said in *Smith v. Cox*, 435 F.2d 453, 460 (4th Cir. 1970), *vacated on other grounds*, 404 U.S. 53 (1971):

> We have no doubt that the due process clause of the fourteenth amendment guarantees that the determination of sentence be made by a judicial officer mentally competent to carry out his duties. To permit a mentally impaired man to weigh the myriad considerations and to make the difficult choices involved in fixing a punishment – choices which often depend on insights into defendant's character and future behavior as well as conclusions as to the seriousness of the offense – would surely violate the standards of fair play established by the due process clause.

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[3] The court is most concerned with the quantities of drugs attributed to Wiley and with the trial judge's decision on where to sentence Wiley within the guideline range. The court believes that the trial judge's determinations on obstruction of justice, role in the offense, and acceptance of responsibility were amply supported by the record. However, at a resentencing, all sentencing issues would presumably be at issue.

This court finds that, under the unfortunate circumstances of this case, due process requires that the defendant be resentenced.

IV. MOTION FOR ISSUANCE OF SUBPOENAS DUCES TECUM

Wiley has also filed a motion for issuance of subpoenas duces tecum (Docket. No. 480). He asks for subpoenas to obtain the trial judge's medical records. This motion is **denied**.

Rule 6(a) of the Rules Governing Habeas Corpus Cases under Section 2255 provides:

> A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

Rule 6(a) of the Rules Governing Section 2255 Proceedings in the United States District Courts, 28 U.S.C. foll. § 2255.

The court finds that there is no justification for the requested discovery. To the extent the discovery is sought to support Wiley's claims that he was denied a fair trial or that his trial counsel and appellate counsel were ineffective, this court has already found that the trial was fair and the Wiley's counsel were not ineffective, and no additional evidence on the mental state of the trial judge would change that determination. To the extent such evidence is intended to support Wiley's claim that he is

entitled to be resentenced, the court has found that he has established this claim without the need for additional evidence.

V. CERTIFICATE OF APPEALABILITY

A federal prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal habeas petition. *See* 28 U.S.C.A. § 2253(c) (West Supp. 1998). A certificate of appealability issues only if the applicant makes a substantial showing of the denial of a constitutional right. *See Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998).

The court believes that, except for the [sic] his claim for resentencing, Wiley has not made a substantial showing that he may have been deprived of a constitutional right on any of his claims. Therefore, the court does not recommend that a certificate of appealability be issued for any of Wiley's claims.

V. CONCLUSION

In summary, the court concludes that the defendant's claims that he was denied a fair trial and that his trial counsel and appellate counsel were ineffective are without merit and should be **denied**. The court further concludes that Wiley's objection to his sentencing should be **granted**, and that he should be resentenced. Accordingly,

IT IS RECOMMENDED that, unless any party files objections[4] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)

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[4] Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

UNITED STATES OF AMERICA, Plaintiff, vs. JEFFREY WILEY, Defendant.	No. CR91-9-MWB **ORDER ACCEPTING MAGISTRATE'S REPORT AND RECOMMENDATION REGARDING DEFENDANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE** (Filed Aug. 15, 2000)

I. INTRODUCTION AND BACKGROUND

On September 26, 1991, defendant Jeffrey Wiley and two others, Ronald Tank and Craig Pflughaupt, were indicted on various drug charges. Following a jury trial, on February 28, 1992, defendant Wiley was found guilty of distribution of marijuana, possession of marijuana with intent to distribute, managing and controlling a building for the purpose of storing and distributing a controlled substance, and conspiracy to distribute marijuana. On July 7, 1992, defendant Wiley was sentenced to 188 months imprisonment, three years supervised release, an $83,200 fine, and a $50 special assessment on each of the four counts.

Defendant Wiley appealed his sentence to the Eighth Circuit Court of Appeals, which affirmed Wiley's conviction and sentence. *See United States v. Wiley*, 997 F.2d 378 (8th Cir. 1993). Wiley subsequently filed the section 2255

motion which is currently pending before the court. Defendant Wiley's motion was referred to United States Magistrate Judge Zoss pursuant to 28 U.S.C. § 636(b)(1)(B) for the preparation of a report and recommendation regarding the disposition of the motion. Judge Zoss filed a thorough and comprehensive Report and Recommendation in this matter in which he recommended that Wiley's motion be granted in part and denied in part. Judge Zoss recommended that Wiley's claims that he was denied a fair trial and that both his and appellate counsel provided ineffective assistance be denied. Judge Zoss, however, determined that the manifest miscarriage of justice exception to the procedural bar rule should be applied here and that Wiley was therefore entitled to be resentenced. The government filed objections to Judge Zoss's Report and Recommendation.

II. ANALYSIS

Pursuant to statute, this court's standard of review for a magistrate judge's Report and Recommendation is as follows:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's Report and Recommendation on dispositive

motions and prisoner petitions, where objections are made, as follows:

> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

In this case, objections have been filed. However, it appears to the court upon review of Judge Zoss's findings and conclusions, that there is no ground to reject or modify them. Therefore, the court accepts Judge Zoss's Report and Recommendation, and orders that defendant Wiley's motion to vacate, set aside or correct sentence is **granted in part and denied in part**. The court further orders that defendant Wiley shall be resentenced on **Thursday, September 14, 2000, at 9:00 a.m.** at the United States Courthouse, Sioux City, Iowa.

IT IS SO ORDERED.

DATED this 15th day of August, 2000.

/s/ Mark W. Bennett
MARK W. BENNETT
CHIEF JUDGE,
U.S. DISTRICT COURT
NORTHERN DISTRICT
OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JEFFREY WILEY, Defendant.	)	No. CR91-9-MWB **ORDER REGARDING RESENTENCING** (Filed Sept. 11, 2000)

I. INTRODUCTION AND BACKGROUND

On September 26, 1991, defendant Jeffrey Wiley and three others were indicted on various drug charges. Following a jury trial, on February 28, 1992, defendant Wiley was found guilty of distribution of marijuana, possession of marijuana with intent to distribute, managing and controlling a building for the purpose of storing and distributing a controlled substance, and conspiracy to distribute marijuana. On July 7, 1992, defendant Wiley was sentenced to 188 months imprisonment on the drug establishment and the drug conspiracy counts and 60 months on the distribution of marijuana, possession of marijuana with intent to distribute counts, with the sentences to be served concurrently. He was also sentenced to three years supervised release, an $83,000 fine, and $50 special assessment on each of the four counts.

On August 15, 2000, the court accepted United State's Magistrate Judge Zoss's Report and Recommendation in which he determined that the manifest miscarriage of

justice exception to the procedural bar rule should be applied here and that Wiley was therefore entitled to be resentenced. On September 7, 2000, a telephonic hearing was held at which defendant Wiley waived his right to provide an allocution on the record. The parties have both filed sentencing memorandums regarding the resentencing. The parties agree that the trial court's determination regarding an obstruction of justice enhancement, defendant Wiley's role in the offense, and acceptance of responsibility are not at issue and need not be addressed on resentencing. Thus, the only issues that need be resolved by the court on resentencing are the drug quantity determination, the determination of the sentence within the established range, and whether the court should grant defendant Wiley a downward departure based on his post-arrest rehabilitation.

II. LEGAL ANALYSIS

A. Drug Quantity

The court notes initially that defendant Wiley does not contest the 82 pounds of marijuana mentioned in paragraph 32 of the Presentence Investigation Report ("PSI") or the thirty pounds referred to in PSI paragraph 33. Moreover, defendant Wiley concedes 240 pounds of the 360 pounds discussed in PSI paragraph 31. Thus, defendant Wiley acknowledges his involvement in the distribution of 352 pounds or 159.67 kilograms of marijuana. Defendant Wiley objects to the remaining drug quantities itemized in PSI paragraphs 25 through 37. The court will address each of the remaining drug quantities enumerated in the PSI *seriatim*.

1. PSI paragraph 25

The 300 pounds of marijuana discussed in PSI paragraph 25 are based on Patrick McMickle's testimony that defendant Wiley was the source of the marijuana that he purchased from Don Raymond. Although Wiley challenges the credibility of McMickle, the court concludes that McMickle's testimony is sufficiently reliable upon which to determine drug quantity. McMickle testified that he was involved in trafficking marijuana between Green Bay, Wisconsin, and Cedar Rapids, Iowa, and regularly purchased marijuana from Raymond. Tr. at 577. He further testified that he had a discussion with Raymond regarding where Raymond was obtaining his marijuana. Tr. at 579. Raymond told McMickle that "[h]e got most of it from Mr. Wiley." Tr. at 579. After Raymond left Marion, Iowa, Wiley approached McMickle and began providing marijuana to him directly. Tr. at 584-85. This action supports McMickle's testimony that Wiley was the source of Raymond's marijuana. The court concludes that the record establishes that Wiley was the source of the marijuana that Raymond sold to McMickle. Moreover, McMickle's role of purchasing marijuana for resale from Raymond provides him with an incentive to know the amounts of marijuana he was purchasing. Thus, the court finds that McMickle's testimony is reliable as to quantities of marijuana purchased from Raymond. However, because McMickle testified that only "most" of the marijuana Raymond was providing him came from defendant Wiley, the court concludes that not all of the 300 pounds found in PSI paragraph 25 should be attributed to defendant Wiley. Therefore, the court will attribute 250 of the

300 pounds mentioned in PSI paragraph 25 to defendant Wiley.

2. PSI paragraph 26

The 300 pounds of marijuana considered in PSI paragraph 26 is again predicated on the testimony of Patrick McMickle that defendant Wiley provided him with this quantity of marijuana. McMickle testified that defendant Wiley "fronted" marijuana to him and that he then sold the marijuana and paid defendant Wiley with the proceeds. Tr. at 585. McMickle testified that he obtained marijuana once or twice a week from defendant Wiley during May, June and July of 1987. On each occasion McMickle obtained one to two pounds of marijuana. Tr. at 586. He further testified that by August of 1987, he was obtaining ten pounds of marijuana a week from defendant Wiley. McMickle continued to do so until his arrest on February 22, 1988. Tr. at 586. The court notes that McMickle testified that he kept records of his marijuana sales because he was responsible for paying defendant Wiley back with the proceeds. Therefore, the court again concludes that McMickle's testimony is sufficiently reliable upon which to determine drug quantity and the court will assess all 300 pounds mentioned in PSI paragraph 26 to defendant Wiley.

3. PSI paragraph 29

Defendant Wiley also objects to the amount of marijuana identified in PSI paragraph 29, specifically, the amount of marijuana delivered by Raymond and Holub to Ron Tank. Defendant Wiley contends that the forty-

nine pounds mentioned in PSI paragraph 29 is inaccurate based on the testimony of Holub. He argues that the court should assess only the thirty-four to thirty-six pounds of marijuana that Holub testified was delivered to Tank. Holub, however, testified that he never weighed the marijuana. Tr. at 830. When asked to explain his role in the transaction, Holub testified that "I just rode with [Raymond]." Tr. at 831. In contrast, Tank testified that he wanted to obtain approximately fifty pounds of marijuana from Raymond and Holub. Tr. at 296. Tank described that the marijuana was delivered in two black plastic garbage bags. Tr. at 296-97. He further described weighing the marijuana and dividing it into one pound packages for further distribution. Tr. at 298. The court concludes that Tank's testimony is more detailed than that of Holub's with respect to this transaction and supports assessment of the forty-nine pounds mentioned in PSI paragraph 29.

4. PSI paragraph 30

With respect to the five pounds of marijuana identified in PSI paragraph 30, Tank testified that this marijuana was delivered to him by Raymond and Craig Pflughaupt. Tr. at 301. Tank was able to identify his customer for the marijuana, his commission for setting up the transaction, and the price of the marijuana. Tr. at 301. The court concludes that Tank's testimony supports assessment of the 5 pounds of marijuana mentioned in PSI paragraph 30.

5. PSI paragraph 31

With regard to the amount of marijuana identified in PSI paragraph 31, as was noted above, defendant Wiley concedes to possession of 240 pounds of the 360 pounds discussed in this PSI paragraph. McMickle testified that he obtained the marijuana distributed on his trips to Wisconsin from defendant Wiley. Tr. at 586-87, 590. McMickle also testified that he took two trips with Pflughaupt and four trips with Kris Eggers to Wisconsin. Tr. at 593. He further testified that on each of these six trips he thought he distributed between 60 and 80 pounds of marijuana, but he candidly admitted that "I couldn't say for sure." Tr. at 593. Tank, however, testified that McMickle delivered forty pounds of marijuana on each of these occasions. Tr. at 302, 306, 309, 312, and 314. After the marijuana was delivered by McMickle, Tank testified that he parceled it out to his associates and brought the proceeds back to McMickle. Tank's testimony is somewhat corroborated by the combination of McMickle's testimony that he paid Pflughaupt $25 per pound for setting up the deal and Pflughaupt's testimony that he received $800 for arranging the sales.[1] The court finds Tank's testimony more detailed than that of McMickle with

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[1] The court notes that the combination of McMickle's testimony that he paid Pflughaupt $25 per pound for setting up the deal with Pflughaupt's testimony that he received $800 for arranging the sales would equate to deliveries of only thirty-two pounds per trip. Although less than the amounts testified to by either Tank or McMickle, it is close to the amount of marijuana testified to by Tank. Therefore, this testimony generally supports Tank's assertion that McMickle delivered forty pounds of marijuana on each occasion.

regard to these transactions and thus more credible. Therefore, the court will attribute only 240 pounds of marijuana to defendant Wiley.

6. PSI paragraphs 34 and 35

Defendant Wiley objects to the two pounds of marijuana detailed in PSI paragraph 34 and the ten pounds of marijuana described in PSI paragraph 35 being assessed against him. He argues that it cannot be established by a preponderance of the evidence that he was the source of the marijuana discussed in those paragraphs because Kevin Meggers had more than one source for his marijuana. Holub testified that he got the marijuana detailed in PSI paragraphs 34 and 35 from Meggers. Tr. at 831, 833. Defendant Wiley himself admitted to McMickle that he was the source of Megger's marijuana. Tr. at 598-99. In addition, Holub testified that in a discussion with Meggers about his marijuana source, Meggers "said something about he was waiting for some old man from Marion." Tr. at 834. Upon review of the record, the court finds that defendant Wiley was the source of the marijuana detailed in PSI paragraphs 34 and 35, and that this amount of marijuana may properly be attributed to defendant Wiley.

7. PSI paragraph 36

The government argues that the 400 pounds of marijuana identified in PSI paragraph 36 should be assessed against defendant Wiley. The court, however, finds that including this marijuana would amount to double counting. The marijuana identified in PSI paragraph 36 related

to two shipments of marijuana to defendant Wiley. All of the other marijuana which previously has been assessed against defendant Wiley related to distributions of marijuana made [sic] his co-conspirators whom defendant Wiley supplied with marijuana. Thus, the two shipments of marijuana identified in PSI paragraph 36 may well have been counted already as marijuana distributed by defendant Wiley's co-conspirators. Therefore, to avoid the possibility of double counting this marijuana, the court will not consider it in assessing defendant Wiley's base offense level.

8. PSI paragraph 37

Finally, defendant Wiley objects to inclusion of the marijuana equivalency identified in PSI paragraph 37, which is based on defendant Wiley's possession and distribution of cocaine. The 101.56 pounds of marijuana equivalency discussed in PSI paragraph 37 is largely based on Megger's tape recorded statement of February 21, 1988, with government informant Bart Hoffman. During that conversation Meggers stated, "He's still got about a half pound out there." Sentencing Tr. at p. 57. Although the record reflects that Meggers had a close relationship with defendant Wiley and Meggers's statement was made during the course of discussing a possible cocaine purchase, the court does not find this statement sufficiently reliable to assess this cocaine against defendant Wiley. The court's concern is two-fold. First, the statement appears to be a mere approximation, the basis for which is unidentified within the statement. Meggers does not state the basis for his knowledge that Wiley has a half-pound of cocaine. Second, Meggers's

motive underlying the statement, and therefore the veracity of Meggers, cannot be ascertained from the statement. It is entirely possible that Meggers was merely puffing the amount of cocaine Wiley was able to obtain in order to elevate his status. It must be noted that no cocaine was ever recovered from Wiley. Because the court does not find this statement sufficiently reliable, the one-half pound of cocaine identified in PSI paragraph 37 will not be assessed against defendant Wiley.

The court, however, will assess the one-eighth ounce of cocaine that defendant Wiley sold to McMickle. Betty McMickle testified that she was present when defendant Wiley distributed one-eighth ounce of cocaine to Patrick McMickle. Tr. at 748. Her testimony is corroborated by Patrick McMickle's testimony that he obtained cocaine from defendant Wiley.[2] Tr. at 648. The marijuana equivalency for one-eighth of an ounce of cocaine is 708.75 grams or 1.56 pounds.

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[2] The government argues that the court should assess the other cocaine purchases that Patrick McMickle testified to against defendant Wiley. These purchases, however, were not part of the PSI. The government made no objections to the PSI. Therefore, the court concludes that the government has waived any argument it may have had that the other cocaine transactions testified to by Patrick McMickle should be included in determining defendant Wiley's base offense level.

9. Total amount of marijuana or marijuana equivalency

PSI PARAGRAPH	PSI AMOUNT	AMOUNT FOUND BY THE COURT
#25	300 pounds	250 pounds
#26	300 pounds	300 pounds
#29	49 pounds	49 pounds
#30	5 pounds	5 pounds
#31	360 pounds	240 pounds
#32	82 pounds	82 pounds
#33	30 pounds	30 pounds
#34	2 pounds	2 pounds
#35	10 pounds	10 pounds
#36	400 pounds	zero pounds
#37	101.56 pounds	1.56 pounds
TOTAL	1639.56 lbs	969.56 lbs

The court concludes that defendant Wiley was responsible for the distribution of 968 pounds of marijuana and 1.56 pounds of marijuana equivalency. The entire amount of marijuana and marijuana equivalency converts to 439.79 kilograms of marijuana. Using the drug quantity table of United States Sentencing Guideline §2D1.1, a base offense level of 28 is called for here because this offense involved at least 400 kilograms of marijuana but less than 700 kilograms of marijuana.

B. Total Offense Level

In addition to the base offense level of 28, the parties do not object to a four point enhancement for defendant Wiley's role in the offense and a two point enhancement for obstruction of justice. Thus, the court concludes that

defendant Wiley's total offense level is 34. It is uncontested that defendant Wiley has level I criminal history category. Therefore, the United States Sentencing Guidelines call for a sentence of incarceration between 151 months and 188 months. Before imposing sentence, the court must first consider Defendant Wiley's request for a downward departure based on his post offense rehabilitation efforts.

C. Downward Departure

Exceptional or extraordinary examples of post-offense rehabilitation may constitute grounds for a downward departure under U.S.S.G. §5K2.0 and 18 U.S.C. §3553(b). *See United States v. DeShon*, 183 F.3d 888 (8th Cir. 1999); *United States v. Kapitzke*, 130 F.3d 820, 823 (8th Cir. 1997); *United States v. Sally*, 116 F.3d 76, 81 (3d Cir. 1997); *United States v. Brock*, 108 F.3d 31, 35 (4th Cir. 1997). Such a departure allows "a chance for truly repentant defendants to earn reductions in their sentences based on a demonstrated commitment to repair and rebuild their lives." *Sally*, 116 F.3d at 81. Departures based on post-offense rehabilitation are not to be awarded lightly. The Eighth Circuit Court of Appeals has observed that "[b]ecause the acceptance-of-responsibility guideline already takes post-offense rehabilitation efforts into account, departure under § 5K2.0 is warranted only if the defendant's efforts are exceptional enough to be atypical of the cases in which the acceptance-of-responsibility reduction is usually granted" *DeShon*, 183 F.3d at 889. Moreover, the Eighth Circuit Court of Appeals has instructed that: "Rehabilitation that takes place behind the prison walls after the original sentencing, however, is

not relevant [at resentencing], since the sentencing court obviously could not have considered it at the time of the original sentencing." *United States v. Sims*, 174 F.3d 911, 913 (8th Cir. 1999); *accord United States v. Edwards*, ___ F.3d ___, 2000 WL 1219421, at *2 (8th Cir. Aug. 29, 2000) (quoting *Sims*); *United States v. McGee*, 201 F.3d 1022, 1023 (8th Cir. 2000). Defendant Wiley's rehabilitation efforts between the time of the charged offenses and the time of his conviction fail to meet the stringent standards for a downward departure based on his post-offense rehabilitation. It must be noted that instead of engaging in rehabilitation efforts, defendant Wiley engaged in acts to obstruct justice during this period by threatening, intimidating and unlawfully trying to influence witnesses in his case. Accordingly, the court denies defendant Wiley's request for a downward departure from the applicable guideline range.

D. Other Issues

Not withstanding [sic] the parties' agreement that the trial court's determination regarding an obstruction of justice enhancement, defendant Wiley's role in the offense, and his acceptance of responsibility are not at issue, the court has reviewed those issues finds no basis for modification of the trial court's conclusions regarding these three issues.

III. CONCLUSION

The court finds a total offense level of 34 and a criminal history category of I. The sentencing range for a total offense level of 34 with a criminal history category I

is 151 to 188 months. Because the amount of marijuana found in assessing defendant Wiley's base offense level is on the low side for a base offense level of 28 and defendant Wiley has been assessed a six level enhancement for his role, the court finds that he should be sentenced at the bottom of the sentencing range. Therefore, with respect to Counts 11 and 12, the court sentences defendant Wiley to a term of imprisonment of 151 months on each count. With respect to Counts 7 and 10, the court sentences defendant Wiley to a term of imprisonment of 60-months on each count. All four sentences are to be served concurrently. Upon release from imprisonment, defendant Wiley shall be on supervised release for a period of three years under the standard and special conditions as set out in the original judgement order. It is further ordered that defendant Wiley shall pay a fine in the amount of $82,300 and pay a special assessment of $200. Finally, it is ordered that the following property is forfeited to the United States:

1. A parcel of real property with building located at 3615 Third Avenue, Marion, Iowa, together with all improvements situated thereon and rights thereto.

2. The businesses known as Jeff Wiley Enterprises, including real estate, inventory, and merchandise located at 3615 Third Avenue, Marion, Iowa together with all improvements situated thereon and all rights pertinent thereto.

IT IS SO ORDERED.

DATED this 11th day of September, 2000.

/s/ Mark W. Bennett
MARK W. BENNETT
CHIEF JUDGE,
U. S. DISTRICT COURT
NORTHERN DISTRICT
OF IOWA

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3444

United States of America,	*	
	*	
Appellant,	*	Order Denying Petition
v.	*	for Rehearing and for
	*	Rehearing En Banc
Jeffrey Wiley,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

June 4, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit